

COMPARATIVE FAULT AND MULTIPLE PARTY LITIGATION IN LOUISIANA: A SAMPLING OF THE PROBLEMS

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Louisiana's comparative fault legislation is deceptively simple. While only five statutory provisions were amended, the change in the law is fundamental. The contributory negligence bar is gone, replaced by the now widely-accepted concept of liability based on proportionate fault. Reaching beyond the rights of the tort plaintiff, the reform provides the framework for a comprehensive scheme of loss apportionment in multiple party litigation. The comparative plan restructures the contribution rights of defendants to reflect the degree of fault of each party and formulates procedures for enlisting the participation of the jury in the process.

As comparative fault is no longer a revolutionary idea in modern tort law, it may seem that Act 431 is long overdue. However, reform in this difficult area of apportioning losses arising from unintentional injury is not at all foreign to Louisiana. The last decade has seen the courts of this state dramatically reshaping the law of torts. By embracing the duty/risk approach and gradually extending the reach of strict liability, the courts have been able to redistribute losses in a more equitable fashion that accords with modern needs. While these judicial reform efforts are still in their formative stages, the results so far are impressive.

Since the new legislation furnishes only a general outline for solving the problem of loss apportionment in multiple party litigation, many details will have to be worked out on a case-by-case basis. Beyond this, the major challenge presented by the Act will be to harmonize its basic scheme with the reforms already undertaken by the courts.

This article presents a sampling of the kinds of problems that are likely to arise in multiple party litigation after adoption of comparative fault in Louisiana. The Act undoubtedly will introduce new complexities in this area of our law. Whether the legislative initiative can nevertheless enhance the prospects for equitable loss apportionment is far less certain.

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Basic Scheme of Act 431

In addition to dismantling the contributory negligence bar against recovery for the negligent plaintiff, the new legislation significantly affects the ultimate liability of defendants in a multiple party case. Under present law, joint tortfeasors whose concurring fault produces a single indivisible harm to the plaintiff are held solidarily liable for the entire loss.¹ The Louisiana Civil Code, in turn, provides a right of contribution to a tortfeasor who pays more than his "virile" or pro rata share of the loss. Ultimately the judgment is divided on an equal or ratable basis, depending on the number of tortfeasors.²

Act 431 fundamentally changes the law of contribution by applying the principle of proportionate fault to determine the division of the loss among the tortfeasors themselves.³ Although in most instances joint tortfeasors will remain solidarily liable to the plaintiff,⁴

1. LA. CIV. CODE art. 2324 (as it appeared prior to 1979 La. Acts, No. 431, § 1). Solidary liability most commonly exists in cases in which the acts of both (or all) tortfeasors were necessary to cause the damage. *See, e.g.,* Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962); Palmer v. Turner, 252 So. 2d 700 (La. App. 1st Cir. 1971). Presumably the courts would also impose solidary liability in a case in which the act of either tortfeasor would have caused the entire damage independently of the other. *See* LeJeune v. Allstate Ins. Co., 365 So. 2d 471, 477 (La. 1978) (dicta).

2. LA. CIV. CODE art. 2103 (as it appeared prior to 1979 La. Acts, No. 431, § 1). Contribution may be secured via third party demand, *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964), or by an independent plenary action, *Morris v. Kospelich*, 253 La. 413, 218 So. 2d 316 (1969).

3. As amended LA. CIV. CODE art. 2103 provides in pertinent part: "If the obligation arises from an offense or a quasi-offense, it shall be divided in proportion to each debtor's fault."

4. An exception to the rule of solidary liability of joint tortfeasors is made by Act 431's amendment to Civil Code article 2324. A new proviso to that article declares that

when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.

Thus, for example, if plaintiff's negligence is assessed at 30% and recovery is sought against a defendant whose share is found to be 20%, plaintiff will be allowed to recover only 20% of his damages from that defendant. In contrast, if the share assigned to the defendant had been 30% or greater, plaintiff could recover 70% of the damages under the general rule of solidary liability.

This proviso is apparently designed to safeguard against the harsh effects of solidary liability in cases involving an insolvent tortfeasor. *See* text at notes 48-61, *infra*. The last phrase of the article is confusing, however, since if solidary liability is eliminated in this one special case, the defendant held liable only for his proportionate share could have no right to *contribution*, although he may seek *indemnity* under cer-

as among the tortfeasors, the loss no longer will be borne ratably. Instead each tortfeasor will ultimately be held liable only for that proportion of the damage attributable to his own fault.⁵

The new comparative contribution system operates to apportion damages on the basis of the relative fault of the defendants even in cases in which the plaintiff is not contributorily negligent.⁶ Thus, if a totally innocent plaintiff is injured as a result of the combined negligence of two defendants, the fact finder is nevertheless required to compare the degree of fault of each defendant, a finding which will determine the amount each will ultimately bear.⁷

Although there is no necessary logical relationship between comparative negligence and comparative contribution,⁸ both operate on the same general principle—that liability should be predicated on

tain circumstances. The article can be sensibly construed only by reading the last phrase ("reserving to all parties their respective rights of indemnity and contribution") as modifying the first phrase of the second paragraph of the article ("[p]ersons whose concurring fault has caused injury, death or loss to another are also answerable, in solido"). As a purely grammatical matter, this sensible construction is improper.

5. By providing for a comparison of the defendants' *fault* rather than *negligence*, the Act operates to apportion damages on a proportionate basis even when a defendant or the defendants are held liable on a strict liability theory. Under amended article 2323, however, plaintiff will suffer a reduction of damages only if his *negligence* contributes to the harm, thus eliminating other types of plaintiff fault as a basis for reducing the award. The effect of Act 431 on strict liability is discussed elsewhere in this symposium. See Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980).

6. The amendment to article 2103, the basic source of the contribution right, provides generally that "[i]f the obligation arises from an offense or a quasi-offense, it shall be divided in proportion to each debtor's fault" without reference to plaintiff's conduct.

7. Amended Code of Civil Procedure article 1811 provides for special jury questions regarding the degree of fault of the defendant(s), LA. CODE CIV. P. art. 1811(B)(1), as well as that of any absent tortfeasor(s), LA. CODE CIV. P. art. 1811(B)(2). For a discussion of the special problems of the absent tortfeasor, see text at notes 48-61, *infra*.

8. Many jurisdictions have embraced the principle of apportionment solely to mitigate the harsh effects of contributory negligence and have continued to divide losses among the tortfeasors on a ratable or equal basis, regardless of the relative degree of fault. See, e.g., GA. CODE ANN. § 105-2012 (1972) (modified comparative negligence); MISS. CODE ANN. § 85-5-5 (1972) (pure comparative negligence); OR. REV. STAT. § 18.440 (1971) (modified comparative negligence); R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1956) (pure comparative negligence).

Conversely, a few jurisdictions have adopted comparative contribution while at the same time retaining the contributory negligence bar. For examples of judicial adoption of comparative contribution, see *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1967) (V.I.); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437, *cert. denied*, 436 U.S. 946 (1978); *Missouri P. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. 1978).

proportionate fault.⁹ And it is this principle that serves as the foundation for the comparative approach in both settings. Certainly in instances in which the negligence of one tortfeasor is greatly disproportionate to that of a co-tortfeasor, application of an automatic equal division rule of contribution appears arbitrary.¹⁰ For such cases, it is desirable to have some mechanism for comparing the conduct of each negligent defendant, determining the relative degree of fault, and assessing liability on a comparative basis. Indeed it would be anomalous to permit a slightly negligent plaintiff (e.g., 10%) to recover 90% of his damages from defendants *A* and *B*, and yet insist that *A* and *B* share the judgment equally, despite one defendant's significantly more negligent conduct.¹¹ In theory at least, there is no logical justification for restricting the principle of comparative fault to govern apportionment only in a two-party suit.

The adoption of comparative contribution in Louisiana, however, may not be viewed as providing the final simple solution to the problem of apportionment of damages in a multiple party suit. The approach to several subsidiary problems such as the treatment of insolvent or absent tortfeasors,¹² the effect of settlement and release,¹³ and the availability of set-off,¹⁴ will require reevaluation in light of the new comparative scheme. Most significantly, implementation of comparative contribution in Louisiana should proceed with a due appreciation of the important function of the judge in shaping and fashioning the legal duties of defendants under the duty/risk approach.¹⁵

9. See Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HAST. L.J. 1465, 1486-87 (1979); Wade, *The Uniform Comparative Fault Act*, 14 FORUM 379, 384-86 (1979); Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J.L. REV. 220, 224-25 (1972).

10. But see Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319, 338 (1980). Professor Johnson speculates that a rule of equal division may be preferable in Louisiana, given the courts' power to control the result by employing a duty/risk analysis. For a discussion of duty/risk in the multiple party case, see text at notes 16-47, *infra*.

11. See, e.g., Packard v. Whitten, 274 A.2d 169 (Me. 1971); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (judicial adoption of proportionate contribution prompted by great disparity of degree of fault between tortfeasors).

12. See text at notes 48-61, *infra*.

13. See text at notes 62-73, *infra*.

14. See text at notes 74-92, *infra*.

15. Reference should be made to such duty/risk classics as: Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962); Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363 (1970); Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin and Associates, Inc.*, 34 LA. L. REV. 1 (1973).

Comparative Contribution and Duty/Risk

Simply by embracing comparative contribution in general principle, the Louisiana legislature has not determined that liability always should depend solely on the percentage of fault assigned the defendants by the fact finder. In many cases, the critical issue will involve the scope of the defendant's duty, a matter largely within the province of the trial court. Only after this duty issue has been resolved satisfactorily does the question of the relative degrees of fault of multiple defendants come into play. And even at this point, the court's obligation to decide the basic scope of the duty issue should provide justification for judicial tempering or adjustment of a jury's verdict in some cases.¹⁶

Examination of the implications of two recent Louisiana Supreme Court decisions indicates that Louisiana's adoption of comparative negligence and contribution will not obviate the need for careful judicial analysis of duties and risks in the particular case. In *Rue v. State Department of Highways*,¹⁷ a motorist sued the state agency for injuries sustained when she inadvertently drove her car off the highway and struck a dangerous rut in the shoulder of the road. The lower courts had determined that the Department of Highways was negligent for failing to maintain the shoulder in a safe condition but denied recovery based on the plaintiff's contributory negligence in driving her vehicle off the paved surface for no apparent reason.¹⁸ The supreme court reversed and held that the plaintiff's substandard conduct should not operate to bar recovery. Employing a duty/risk analysis, the court concluded that the defendant's duty extended to even a careless motorist such as the plaintiff and encompassed the foreseeable risk that "for any number of reasons, including simple inadvertence, a motorist might find himself travelling on, or partially on, the shoulder."¹⁹

By fashioning the defendant's duty broadly, the court in *Rue* neatly circumvented the harshness of the contributory negligence bar. Given the greater negligence of the Department of Highways, the court might simply have believed that it would be grossly unfair to deny all recovery to the slightly negligent plaintiff.²⁰ The

16. Amended Code of Civil Procedure article 1811(B), for example, directs the court in a jury case to "enter judgment in conformity with the jury's answers to these special questions and according to applicable law." (Emphasis added.) As discussed *infra*, the court's determination of the scope of defendant's duty may be regarded as a crucial part of the "law" applicable to the case.

17. 372 So. 2d 1197 (La. 1979).

18. *Id.* at 1198 & nn.1-2.

19. *Id.* at 1199.

20. The court noted that "plaintiff's conduct if indeed it was substandard is no bar to her recovery of damages occasioned chiefly because the Highway Department

duty/risk approach may thus have functioned as a convenient device seized upon by the court to justify the more desirable result: 100% relief rather than no recovery at all. If this is a correct assessment of *Rue*, we can speculate that after adoption of comparative negligence, the court in a similar action should have little difficulty deciding that the plaintiff's negligence warrants a reduction of damages.

It is far from clear, however, that passage of the comparative fault statute should change the result in *Rue* (i.e., 100% recovery for the plaintiff). As Professor Johnson thoughtfully analyzes in this symposium,²¹ a strong argument can be made that in defining defendant's duty to encompass the risk of the careless plaintiff, the court in *Rue* was doing more than employing a fiction to overcome the contributory negligence bar. Policy considerations underlying the decision may have required that even the careless plaintiff be allowed full recovery.²² The negligence of the Department of Highways posed a risk of serious injury to a great number of persons who may encounter the hazardous condition. The plaintiff's inadvertence, on the other hand, presented only a relatively slight risk of harm to herself and to passengers in the meandering vehicle. This lack of mutuality of risks may prompt the court to decide that policy dictates that, in some cases at least, plaintiff's carelessness should not even operate to reduce the award.²³ The Department is in the best position to decrease the chances of any future injury by repairing the road. The court could reasonably conclude that only full recovery would produce the desired prophylactic effect, especially if reduction of plaintiff's damages would not serve to deter other motorists from inadvertent meandering but would function solely as a penalty for substandard conduct.

The interaction of duty/risk and comparative fault produces even more complexities in a multiple party case. Suppose that the plaintiff in *Rue* had driven onto the shoulder to avoid an oncoming vehicle driven by *X* who was encroaching slightly over the center line. It could fairly be determined that *X* was negligent in crossing the center line at all but that plaintiff also negligently overreacted

negligently failed to maintain a safe highway shoulder." *Id.* (Emphasis added.)

21. See generally Johnson, *supra* note 10, at 333-34.

22. For a comprehensive discussion of Louisiana's selective abrogation of the contributory negligence bar, see the excellent student note, *Abrogation of the Contributory Negligence Bar in Cases of Disparate Risks*, 39 LA. L. REV. 637 (1979).

23. Article 2323 as amended authorizes a reduction of damages only "[w]hen contributory negligence is applicable to a claim for damages." Elsewhere in this symposium, Professor Johnson demonstrates that the statutory limitation is most compatible with the duty/risk approach and may well prohibit any reduction of damages in certain cases when defendant's duty extends to the protection of a careless plaintiff. Johnson, *supra* note 10, at 333-34.

by driving onto the shoulder rather than merely swerving slightly to the right.

Rue suggests that under present law, at least, plaintiff nevertheless may receive full recovery against the Department of Highways.²⁴ The risk that a motorist will negligently respond to an apparent emergency is highly foreseeable and seems to fit comfortably within the duty of the Department to protect certain careless plaintiffs in certain circumstances.²⁵

If the Department paid the total judgment, however, it is unclear whether under the present contributory negligence scheme it could obtain contribution from *X*, even though *X*'s negligence contributed to the plaintiff's injuries. *X* could argue that he should not be considered a joint tortfeasor liable in solido with the Department, since the flexible duty/risk approach allows for the possibility that the plaintiff's careless conduct will be considered an included risk when gauged against the duty of one defendant but may defeat liability in relation to another defendant.

Generally, a tortfeasor has a right to obtain contribution only if he proves that the injured party would have been entitled to recover against the defendant in the contribution action.²⁶ In this hypothetical case, *X* might well have prevailed in an action brought by the plaintiff, relying on plaintiff's contributory negligence to bar recovery.

Vis-à-vis the oncoming driver, plaintiff's position is not as strong as that presented in the case against the Highway Department. The conduct of each driver created a similar risk of injury to travelers on the highway. Moreover, imposing liability on *X* is unlikely to function as a strong deterrent, and there is no reason to believe that *X* rather than the plaintiff is better able to bear and distribute the loss. In light of these factors, it is doubtful that the court would be willing to lift the contributory negligence bar by declaring that *X*'s duty not to traverse the center line was designed to protect even negligent motorists in the "obstructed" lane. Thus, to succeed in the contribution action, the Department must either convince the court that plaintiff's contributory negligence would not have proved fatal in an action brought against *X* or that *X* may not fairly raise the

24. Cf. *Watson v. Morrison*, 340 So. 2d 588 (La. App. 1st Cir. 1976), cert. denied, 342 So. 2d 218 (La. 1977) (full recovery granted where motorist drove off paved surface mistakenly responding to apparent emergency).

25. Conversely, the Department's duty does not extend to all negligent plaintiffs in all circumstances. See *Rodgers v. State Dep't of Hwys.*, No. 13,936 (La. App. 2d Cir. Sept. 24, 1979) (post-*Rue* case denying recovery where intoxicated driver was aware of dangerous road shoulder).

26. See generally W. PROSSER, *THE LAW OF TORTS* § 50, at 309 (4th ed. 1971).

contributory negligence argument in the contribution action.²⁷ These obstacles make it likely that the Department would be responsible for paying the entire judgment.

Once comparative negligence and comparative contribution are in force, the possible solutions to the *Rue*-type three-party case multiply. Assume that under the new comparative regime, plaintiff in the hypothetical case files suit against both the Highway Department and X and the defendants request a jury trial.²⁸ If the judge concludes that there is evidence to raise a jury issue with respect to the negligence of all three parties, a cursory reading of amended Code of Civil Procedure article 1811 might suggest that the court must now submit the case to the jury via special written questions. The jury would then be told to decide whether each party's conduct constituted a "proximate cause" of the damages,²⁹ determine the "degree of fault" of each "expressed in percentage," and assess the total amount of damages sustained by the plaintiff. Finally, based on the percentage figures returned by the jury, the court would determine the liability of each defendant simply by multiplying his assigned percentage times the total amount of damages.

The amendment providing for special verdicts in damage actions need not be interpreted to require the court's stringent adherence to the above scenario in all cases. Rather, even after passage of the comparative fault legislation, the court should retain

27. An analogy could be drawn to cases in which the court has refused to permit the defendant in the contribution action to defeat recovery by relying solely on his personal immunity to suit in an action by the injured party. See *Walker v. Milton*, 263 La. 555, 268 So. 2d 654 (1972) (joint tortfeasor may recover contribution from plaintiff's parent); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965) (joint tortfeasor may recover contribution from plaintiff's husband). These cases dealt with a procedural bar to recovery and would likely prove unpersuasive when the obstacle to liability is a substantive defense such as contributory negligence. Cf. *Certain Underwriters at Lloyd's v. United States*, 511 F.2d 159 (5th Cir. 1975).

28. The hypothetical case would likely be tried to the court sitting without a jury since Revised Statutes 13:5105 bars jury trials in suits against the state agency. However, the statutory prohibition has been held not to deprive a public body of the opportunity for a jury trial if it so desires. *Triche v. City of Houma*, 342 So. 2d 1155 (La. App. 1st Cir. 1977).

29. It is unfortunate that the Act speaks in terms of "proximate cause," a confusing label that is rapidly being discarded in the adjudication of tort cases in Louisiana. See generally Robertson, *supra* note 15. By directing the court to submit a jury question "inquiring as to" proximate cause, the legislature may simply have intended to focus the jury's attention on the basic cause-in-fact issue. If so, article 1811 should be amended to delete the word "proximate" to avoid confusion. However, if it is deemed desirable to have the jury participate in determining the scope or ambit of a party's duty, a suitable instruction can be fashioned without reference to proximate causation. See A. JOHNSON, PATTERN JURY INSTRUCTIONS IN LOUISIANA CIVIL CASES WITH ANNOTATIONS AND COMMENTS 1-19 (1980) (thorough analysis of several possible formulations of jury instructions relating to the problem of risk exclusion).

its power to control the result, both with respect to the existence of liability as well as the extent of liability. Such control can be exerted by permitting the court to conform the jury's verdict to its own assessment of the scope of defendants' duties in the particular case.³⁰

In theory, the new comparative legislation authorizes at least four different solutions to loss apportionment in the *Rue*-type multiple party case. In each, the court's evaluation of the scope of defendants' duty plays a critical role in determining the extent of liability.

First, the court could decide that the broad duty of the Highway Department to protect even careless motorists provides justification for some recovery, but should not deprive the agency of its comparative negligence "defense." Unconstrained by the all or nothing choice presented under the prior law, the Department may now more forcefully insist that plaintiff's substandard conduct warrants a penalty in the form of a reduction of damages commensurate with the plaintiff's proportionate fault. The court could thus reassess the rationale of *Rue* and conclude that the policy reasons for holding the Department liable for 100% of the plaintiff's damages in that case do not compel similar treatment now that the option of a limited recovery is available.

As between the two defendants, the new comparative negligence scheme may furnish the Department with a solid basis for obtaining contribution from *X*, the oncoming driver. No longer would *X* be able to claim that plaintiff's contributory negligence operates as a bar to recovery in an action by the plaintiff against him. Rather it is most likely that under pure comparative negligence the plaintiff could obtain a reduced judgment against *X* as well as the Department.³¹ Under this analysis, the Department should have a right to compel contribution from the oncoming driver on a comparative basis and should be responsible only for its own proportionate share. In a jury case, the court would submit the issue of the negligence of all parties and render judgment based on the percentage figures returned by the jury. Plaintiff would receive a reduced judgment and both the Department and *X* would satisfy the reduced judgment proportionately.

Second, as mentioned above,³² the court might well regard the Department's broad duty as rendering the plaintiff's contributory

30. The statutory basis for sanctioning such leeway in the computation of the final judgment is article 1811's direction that the court enter judgment "according to applicable law." See note 16, *supra*.

31. But see text at note 33, *infra*, setting forth a possible argument for *X* to defeat recovery.

32. See text at notes 21-25, *supra*. See Johnson, *supra* note 10, at 333-34.

negligence "inapplicable" or irrelevant and thus furnishing no justification for even a reduction of damages. This determination would manifest the court's affirmation of the policy underlying *Rue*, thus requiring that this negligent plaintiff be fully compensated, notwithstanding the legislative judgment that other negligent plaintiffs should suffer a reduction of damages.

Moreover, it is conceivable that the Department's right to seek contribution from *X* might also be affected by the court's duty determination. Particularly if the court were to focus on the disparity of the risks created by the two tortfeasors, it might conclude that the entire loss should be shifted to the Department. Once the Department's duty is enlarged to encompass a risk posed in part by negligent driving, there may be a temptation to correspondingly limit the scope of the motorist's duty solely to the risk of injuries sustained on safely maintained roadways.

By taking such an extreme view, the court would absolve *X* from all responsibility—both to pay the plaintiff initially as well as to respond to the Department's contribution claim.³³ Such a broad judicial view of the Department's duty would limit the role of the jury severely; only the questions of the negligence of the Department and the extent of plaintiff's damages would be submissible. As under present law, plaintiff would recover 100% of the damages solely from the Department.

Third, the court could decide that although plaintiff should not suffer any reduction of damages, given the Department's comprehensive duty, the Department should nevertheless be entitled to obtain contribution from the oncoming driver as a joint tortfeasor. The question then arises as to the proper basis for dividing the damages between the two tortfeasors. Should the judge instruct the jury to ignore plaintiff's negligent contribution to the injury and assign percentages as if only two persons negligently produced the harm?³⁴ If the plaintiff's conduct is disregarded, *X* could argue that he has been prejudiced insofar as he has been required to propor-

33. Most probably, the Department's contribution right against *X* would be recognized if *X* were deemed to be liable in any degree to the plaintiff. In Louisiana, the courts have been particularly reluctant to afford a joint tortfeasor a tort indemnity right against his co-defendant, unless the former is completely free from personal fault. See, e.g., *Green v. Taca Int'l Airlines*, 304 So. 2d 357 (La. 1974); *Lee v. City of Baton Rouge*, 243 La. 850, 147 So. 2d 868 (1962); *Second Church of Christ, Scientist v. Spencer*, 230 La. 432, 88 So. 2d 810 (1956). In the hypothetical case, *X* would have little basis for arguing that the entire loss should be borne by the Department once it is determined that *X* was negligent and legally responsible to the plaintiff.

34. A similar problem of comparison exists when one of the tortfeasors is absent or insolvent. See text at notes 48-61, *infra*.

tionately bear the plaintiff's share.³⁵ A more desirable approach might be to tack the plaintiff's share onto the share of the Department. In a jury case, the court might adjust or temper the verdict in accordance with the law (*i.e.*, the court's duty determination) by taking the plaintiff's percentage of negligence and adding it to the Department's share.³⁶ Plaintiff would then recover 100%, X would be held liable for his proportionate share, and the Department would pay for its own negligence and that of the plaintiff.

Fourth, the court might seek to effectuate its broad duty determination by allowing plaintiff to recover both his share and the share of the Department from the Department alone. At the same time, the principle of comparative negligence could be given effect by curtailing plaintiff's right to recover the balance of his damages from the oncoming motorist. Such a compromise approach could be implemented either by a deduction in an amount representing the percentage of plaintiff's negligence times the outstanding balance or by a deduction based on the ratio of plaintiff's negligence to that of X.³⁷ Again, the court would exercise control over the ultimate apportionment by conforming the jury's percentages to its own determination of the parties' respective duties. Plaintiff would receive less than 100% recovery, with the oncoming motorist deriving all the benefit from the reduction.

These four solutions, and perhaps others, suggest possible interpretations of the new statute when juxtaposed with the duty/risk approach. The first choice, that of holding each negligent party responsible for his proportionate share, seems preferable under the limited facts of the hypothetical case. The equities do not lie so heavily in favor of plaintiff such that any reduction in damages is unwarranted. Moreover, there does not appear to be an overriding policy justification for charging the Department with the entire loss, although it is likely that it will end up paying the bulk of the damages.³⁸ That the full-scale comparative solution may be most

35. For example, assume the plaintiff's damages are \$100,000 and that the plaintiff is 10% negligent; X, 30% negligent; and the Department, 60% negligent. If the plaintiff's contribution is disregarded, the share of X would be increased to \$33,333, representing the ratio of X's negligence to that of the Department.

36. Thus using the percentages given in note 35, *supra*, X would pay \$30,000 and the Department \$70,000.

37. Thus, for example, the court could conform its judgment to the jury's percentages as given in note 35, *supra*, by requiring the Department to pay \$70,000 and limiting X's obligation to either \$27,000 or \$20,000, depending on the method used to arrive at the appropriate deduction.

38. A problem might arise if the verdict indicates that the jury placed too little weight on the Department's "passive" negligence in failing to maintain a safe shoulder and too much weight on the other participants' "active" negligence. In such a case, it might be desirable to permit the judge to refuse to adhere to the jury's percentages

desirable in this litigation, however, provides little help in a factually and legally dissimilar action.

The recent case of *Boyer v. Johnson*³⁹ provides a striking contrast. A fifteen-year-old boy was killed when he lost control of a commercial vehicle he had been employed to drive, skidded along the shoulder of the road into a ditch, and struck a tree. In a wrongful death action brought against an executive officer of the boy's employer,⁴⁰ the supreme court granted full recovery. The court based its decision on the defendant's violation of certain statutory provisions prohibiting the employment of minors to drive commercial vehicles or work in connection with power driven machinery.⁴¹ Although the boy had been negligent in his operation of the vehicle, the court held that such negligence did not preclude recovery since the key purpose of the child labor statutes was to protect the minor against risks arising from his own negligence, youth, and inexperience.⁴² Again, by fashioning the defendant's duty broadly, the court was able to circumvent the contributory negligence bar and clear the way for 100% recovery for the plaintiffs.

If *Boyer* is transformed into a three-party suit, sticky problems arise in the determination of the proper allocation of damages under the new comparative statute. Assume that the fifteen-year-old boy, while driving the commercial vehicle, was killed when he collided with a car driven by A. The evidence discloses that A was negligent in stopping his car so as to create a partial obstruction in the lane of

and instead substitute his own evaluation as to the degree of fault of each of the parties. Absent the sanction of a procedural device such as a judgment notwithstanding the verdict, however, it is doubtful that the judge's power extends this far. For a discussion of the procedural devices available to allocate tasks between the judge and jury, see A. JOHNSON, *supra* note 29, at 4-11.

39. 360 So. 2d 1164 (La. 1978).

40. The suit arose prior to the 1976 amendments to Louisiana's Workmen's Compensation Act that now bars an employee from suing his co-employee in tort for work-related injuries. See 1976 La. Acts, No. 147, amending LA. R.S. 23:1032 & 1101 (1950). Thus it is doubtful that a similar action could be maintained today, unless the bar against co-employee suits is held unconstitutional. See, e.g., *Grantham v. Denke*, 359 So. 2d 785 (Ala. 1978); *Halenar v. Superior Court*, 109 Ariz. 27, 504 P.2d 928 (1972) (barring suit against negligent co-employee held violative of state constitution). In the following discussion of *Boyer*, the term "employer" is used for convenience to designate an executive officer of the plaintiff's employer. There is no question that a suit against the actual employer would be barred because of the exclusive workmen's compensation remedy.

41. LA. R.S. 23:161(10) (Supp. 1976); 23:163 (1950). The statutes make it unlawful for a minor to "be employed, permitted or suffered to work" in certain dangerous occupations. LA. R.S. 23:163 (1950). Presumably an executive officer (as well as the technical employer) falls within the statutory prohibition by "permitting" a minor employee to work in such circumstances.

42. 360 So. 2d at 1169.

traffic, but that the boy was also negligent in failing to keep a proper lookout and safely maneuver his vehicle around the obstruction.

In a wrongful death action brought against both *A* and the employer by the boy's parents, the court at the outset must grapple with difficult scope of duty questions. Relying on *Boyer*, the court may regard the employer's duty as encompassing the risk that the minor would be injured as a result of his own negligence in combination with that of another driver.⁴³ Should the minor's negligence nevertheless provide a justification for reduction of damages in the suit against the employer? Even after passage of the comparative negligence statute, a strong argument can be made that reduction is unwarranted since the policy against the employment of minors is a particularly strong one.⁴⁴ The employer may more easily bear and distribute the risk as a cost of doing business and is in a better position to prevent recurrence of similar injuries by obeying the legislative proscription against hiring minors. These considerations may well counsel in favor of 100% recovery in an action against the employer.

The same policy considerations are not present in the suit against *A*. When the negligent conduct of the deceased is viewed in relation to the negligent conduct of *A*, there is a stronger argument for a reduction of damages. Both drivers created a similar risk of injury to themselves and others, and no strong general policy exists to protect minors as operators of motor vehicles. Moreover, there is no reason to believe that *A* rather than the plaintiffs is necessarily better able to shoulder and distribute the loss.

In this factual setting, the third approach suggested above in the *Rue*-based hypothetical case may be preferable. Given the special statutory protection afforded minors, it seems just to require the employer to pay for the minor's proportionate share as well as his own, while requiring *A* to pay only in proportion to his individual fault.

43. *Cf., e.g., Pierre v. Allstate Ins. Co.*, 257 La. 471, 242 So. 2d 821 (1970); *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962) (statutory duty not to obstruct highway encompassed risk of intervening negligence of third-party motorist).

44. *See, e.g., LA. R.S. 23:161* (Supp. 1976) (fourteen prohibited occupations for minors). To promote the policy behind the child labor laws, most contributory negligence jurisdictions have allowed recovery despite the minor employee's negligence. *See, e.g., Boyles v. Hamilton*, 235 Cal. App. 2d 492, 45 Cal. Rptr. 399 (1965); *Dusha v. Virginia & Rainy Lake Co.*, 145 Minn. 171, 176 N.W. 482 (1920); *Karpeles v. Heine*, 227 N.Y. 74, 124 N.E. 101 (1919). One court has even refused to permit the minor's negligence to operate to reduce the award in a comparative negligence setting. *Hartwell Handle Co. v. Jack*, 149 Miss. 465, 115 So. 586 (1928).

On the other hand, requiring the employer to pay 100% of the damages would surely bolster the legislative determination that employing minors to perform tasks beyond their competence is highly undesirable. More importantly, administrative considerations favor shifting the entire loss to the employer. To require the judge or particularly a jury to evaluate the degree of fault attributable to the employer and in turn compare that to the negligent conduct of *A* is fraught with difficulty. The employer is held strictly liable for violating the statutory prohibition, even though he may have acted as a totally reasonable employer in supervising and instructing his minor employee. In marked contrast, the basis for holding *A* liable is personal fault; if *A* had acted as a reasonable driver he could have escaped liability altogether. In determining the share of the employer, should the fact finder take into account the employer's effort at supervision and instruction, thereby reintroducing personal fault to determine the extent of liability if not its existence? Unless the employer's conduct is measured using a negligence yardstick, it seems impossible to compare it in a meaningful fashion to the conduct of the motorist.⁴⁵

A reintroduction of personal fault in the child labor case could undercut the legislative (and judicial) decision to hold the employer strictly accountable. Despite the seeming inconsistency with the comparative fault principle, placing the entire burden on the employer may be the most practical and equitable solution.⁴⁶

Many more examples could be given to demonstrate that the goal of equitable loss apportionment will not be accomplished simply by empowering the judge or jury to divide the damages based on the parties' proportionate fault.⁴⁷ The determination of the amount each party should pay cannot and should not be divorced from the considerations of policy that have influenced the courts to expand or

45. For a discussion of the problem of "comparing the incomparables," see *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 736, 144 Cal. Rptr. 380, 386, 575 P.2d 1162, 1167 (1978); Fleming, *supra* note 9, at 1472-77; Plant, *supra* note 9.

46. Another feasible alternative to placing the loss on the employer alone, given the problems of comparison, would be to divide the damages on a per capita basis and require each tortfeasor to pay 50%. For a discussion of the advantages of a pro rata or discount system in strict liability settings, see *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 749-51, 144 Cal. Rptr. 380, 393-95, 575 P.2d 1162, 1175-77 (1978) (Clark, J., dissenting).

47. *E.g.*, suppose a pedestrian, after being ejected from a bar in an intoxicated condition, is run over by a negligent motorist. Two recent supreme court decisions, *Baumgartner v. State Farm Mut. Ins. Co.*, 356 So. 2d 400 (La. 1978); *Pence v. Ketchum*, 326 So. 2d 831 (La. 1976), may be interpreted to allow the plaintiff full recovery, despite the existence of contributory negligence. Apportioning the damages between the bar owner and the motorist would present problems similar to those posed in the hypothetical cases discussed in the text.

restrict the scope of the risks for which defendants will be held liable. Rather, by embracing the principle of proportionate fault, the legislature has potentially given the courts a powerful new tool to distribute losses from unintentional injury on other than a crude all or nothing basis. The presumed benefits of the new legislation could be largely undermined, however, if a mechanical application of comparative fault serves to stifle or suffocate the development of the duty/risk analysis in Louisiana.

Solidary Liability and the Absent or Insolvent Tortfeasor

The goal of equitable loss apportionment in a multiple party case cannot be fully achieved without consideration of the closely related issues of solidary liability and the treatment of absent or insolvent tortfeasors. The new legislation only partially addresses these problems and raises several questions for future litigation.

With one notable exception, Act 431 reaffirms the principle of solidary liability of joint tortfeasors.⁴⁸ As under present law, a defendant whose conduct contributed to plaintiff's injury may be obligated to pay the plaintiff for his own share as well as that attributable to the conduct of other tortfeasors.⁴⁹

Although at first glance solidary liability appears to conflict with the principle of proportionate fault and may seem unfair to the defendant, the doctrine rarely entails hardship for the solidary obligor. Rather, in the vast majority of cases the tortfeasor ultimately can reduce his burden by seeking contribution from his co-tortfeasor via a third-party demand or an independent action.⁵⁰ It is only when such co-tortfeasor is not amenable to suit in the jurisdiction, cannot be found, or is insolvent that the doctrine is of practical significance.

The modern justification for the retention of solidary liability is founded on the notion that the innocent plaintiff should obtain full compensation from any person whose fault was an indispensable factor in producing the harm.⁵¹ As a matter of fairness, the party at

48. The amendment to article 2324 explicitly states that "[p]ersons whose concurring fault has caused injury, death or loss to another are also answerable, in solido." The proviso to article 2324 creating an exception to the rule of solidary liability is discussed in note 4, *supra*.

49. Of course, under pure comparative fault, the solidary obligor will not be required to pay for the portion of the loss attributable to plaintiff's contributory negligence. Instead, any disproportionate liability will arise solely from payment of a co-tortfeasor's share.

50. See note 2, *supra*.

51. See, e.g., *Thorton v. Luce*, 209 Cal. App. 542, 552, 26 Cal. Rptr. 393, 399 (1962); Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CAL. L. REV. 1264, 1265-66 (1977).

fault should have the burden of bringing all others responsible for the harm into the lawsuit. When all tortfeasors cannot be joined, it is just to require the blameworthy defendant to pursue his contribution claim in another forum or suffer any loss arising from the uncollectible nature of the debt.

Adoption of comparative fault legislation does not of itself affect the soundness of the above analysis. If the plaintiff is in no way contributory negligent, he should still be entitled to the procedural and substantive benefits of the rule of solidary liability. Thus, most jurisdictions regard the abolition of solidary liability as unduly harsh in the case of the totally innocent plaintiff.⁵²

It is much harder to justify application of solidary liability when the plaintiff's substandard conduct contributes in part to his own injuries. In such circumstances, there is no logical reason why the defendant should always bear the burden of pursuing absent defendants and absorbing all losses from insolvency. Influenced by the likelihood that a negligent plaintiff will be unfairly benefited, some jurisdictions have abolished solidary liability along with the adoption of comparative negligence.⁵³

Following the approach of the Texas comparative negligence legislation,⁵⁴ Act 431 adopts a compromise position with respect to solidary liability. Amended article 2324 retains solidary liability in those cases in which the plaintiff's negligence is equal to or less than the defendant's but eliminates solidary liability when the plaintiff's degree of negligence is greater than the defendant's degree of fault.⁵⁵

This partial abrogation of solidary liability effects a kind of rough justice, not unlike the compromise struck by modified comparative negligence plans. When the tortfeasor's absence is caused by jurisdictional hurdles only, the legislative compromise is acceptable. However, the scheme is likely to produce particularly harsh results to plaintiffs and defendants alike when the absent tortfeasor's share is truly uncollectible.

Effective implementation of a pure comparative fault scheme such as that adopted by Louisiana requires that all persons respon-

52. See, e.g., *Wheeling Pipe Line, Inc. v. Edrington*, 259 Ark. 600, 535 S.W.2d 225 (1976); *Dunham v. Kampman*, 37 Colo. App. 233, 547 P.2d 263 (1975), *aff'd*, 560 P.2d 91 (Colo. 1977); *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975); *Fitzgerald v. Badger State Mut. Cas. Co.*, 67 Wis. 2d 321, 227 N.W.2d 444 (1975).

53. See, e.g., *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978) (joint and several liability abolished whenever plaintiff's fault is "at issue"); NEV. REV. STAT. § 41.141(3) (1973) (joint tortfeasor liable only for proportionate share).

54. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1973). See also OR. REV. STAT. § 18-485 (1975).

55. See proviso to amended article 2324, cited at note 4, *supra*.

sible for the injury be brought into the litigation. If a tortfeasor is absent, problems may arise in assigning the correct percentage of fault to the existing parties to the litigation. Moreover, since the absent tortfeasor is not bound by the determinations made in a suit in which he was not a party, there is always the risk that an inconsistent judgment will be rendered in a subsequent action.

Louisiana's liberal joinder rules⁵⁶ and the availability of the third party demand⁵⁷ generally make it feasible for either the plaintiff or the existing defendant to bring in other involved parties in a tort action. Often the plaintiff can be expected to sue all possible defendants, especially if his claim is vulnerable with regard to any particular party. If for some reason the plaintiff chooses not to sue a particular tortfeasor, the existing defendant ordinarily can be relied upon to bring him in as a third party defendant either to direct attention away from the defendant's alleged wrongdoing or to secure contribution in the most speedy manner.

When joinder of all involved persons is not feasible, two inter-related problems arise. First, how should the fault of the absent tortfeasor be taken into account in computing the shares of the existing parties? Second, who should bear the burden, even provisionally, that may result from the tortfeasor's absence?

The new legislation contemplates that the conduct of all persons responsible for plaintiff's injury should be evaluated by the fact finder. Under amended Code of Civil Procedure article 1811, the judge is required to submit a special question to the jury regarding the causative fault of "another involved person" who was not made a party to the suit. In turn, the judge is responsible for computing the amounts owed by the existing defendant(s) "in conformity with the jury's answers." But article 1811 fails to specify how the absent tortfeasor's share should affect the amount recoverable by the plaintiff. The article does not state whether, in computing the judgment, the court must base its calculations strictly on the assigned percentages or rather should compare the defendant's fault to that of the plaintiff only, by using the jury's answers to construct a ratio of fault between the parties to the lawsuit.

Suppose plaintiff (*P*) sustains injuries amounting to \$100,000 as a result of his own negligence and that of two other persons (*A* and *B*). *P* chooses to sue *A* alone and *A* does not assert a third party demand against *B*. In response to the special interrogatories, the jury assigns percentages of fault as follows: *P*, 20%; *A*, 30%; *B*, 50%.

56. LA. CODE CIV. P. arts. 463-65 & 647.

57. LA. CODE CIV. P. art. 1031.

At first blush, article 1811 seems to suggest that *P* is entitled to judgment against *A* for \$80,000—the amount of his loss reduced by the share represented by his contributory negligence (*i.e.*, 20% or \$20,000). However, the language is susceptible of another interpretation: the court should conform its judgment to the jury's answers by considering the ratio of *A*'s negligence to that of the plaintiff. When viewed in this light, *A* should bear only 60% of the loss (\$60,000), since the ratio of fault between *P* and *A* is two to three or 40% and 60%. Under this analysis, plaintiff's recovery will have been reduced proportionately vis-à-vis the only other party in the suit, namely *A*.

The practical effect of employing the ratio approach is to divide the absent tortfeasor's share between the existing parties on a proportionate basis. The primary advantage of this method of computing shares is that neither party will be required to shoulder the loss unilaterally but will pay for the absent tortfeasor's share only in proportion to his own fault.⁵⁸

Although the new Act is ambiguous on this score, it is doubtful that the legislature intended to endorse the ratio approach. Instead, amended Civil Code article 2324 suggests that the absent tortfeasor's share should be borne solely by the party who is more at fault. The thrust of the amended article is that the more blameworthy party should pursue the absent tortfeasor in another forum or absorb the loss if such person proves to be insolvent or cannot be located.

When the sole reason for the tortfeasor's absence is that he is not amenable to suit in the forum, the legislative compromise seems acceptable. The party more at fault need only provisionally pay for the absent tortfeasor's share. Presumably he can cut his losses down to his proportionate share simply by filing another lawsuit. The burden of pursuit, although entailing additional expense, may reasonably be placed on the party judged chiefly responsible for the damage.

If the absent tortfeasor is insolvent or if for any other reason his share is uncollectible, the compromise approach of article 2324 can be quite harsh to either the plaintiff or the solvent defendant.⁵⁹

58. The Uniform Comparative Fault Act in effect adopts the ratio approach by limiting the comparison of fault to "parties" and ignoring the contribution of persons who are not before the court. See UNIFORM COMPARATIVE FAULT ACT § 2(a)(2) & comment. For the text of the Uniform Act, see the appendix to this symposium, *infra* p. 419.

59. Of course, the same result would obtain even if the insolvent tortfeasor were brought into the suit. The real risk derives from the uncollectible nature of a portion of the debt, not from absence. However, since no advantage can be gained under Act 431 from suing a judgment-proof person, it is likely that litigants will simply not join such persons.

The dramatic example would be a case in which plaintiff is found to be 20% negligent; tortfeasor A, 19% negligent; and tortfeasor B, 61% negligent. A sole percentage point determines whether plaintiff will recover a substantial judgment (i.e., 80%) from A in case of B's insolvency or whether his recovery will be limited to a mere 19% of his damages. The plan of article 2324 suffers from the arbitrary feature associated with modified comparative negligence statutes in that a plaintiff's ultimate recovery may be unduly affected by the precise percentage of fault assigned by the fact finder. Nor does it seem to accord with the basic principle of proportionate loss allocation to require the solvent defendant to shoulder the full insolvency loss when the plaintiff is also at fault, albeit to a lesser degree.

Aside from these equitable considerations, the compromise embodied in amended article 2324 tends to conflict with other pronouncements of the Civil Code. Article 2104 sets down the general rule that a solidary codebtor who pays the whole debt may assert a claim for only the "part and portion" attributable to his codebtor. The article additionally provides for the case of the insolvent codebtor and declares that "the loss occasioned by his [i.e., a codebtor's] insolvency must be equally shared amongst all the other solvent codebtors and him who has made the payment."

By distributing the loss among the solvent solidary obligors, article 2104 seems to endorse an equitable principle that all responsible persons should bear the insolvency burden. In contrast, amended article 2324 contemplates that the burden of insolvency shall fall solely on the party more at fault, whether plaintiff or defendant.

It is unclear whether article 2104 will have any application to tort cases once the comparative fault statute goes into effect. Although the courts have indicated that the codal rules governing solidary liability apply both to conventional and delictual obligations,⁶⁰ article 2104 contains two features that may be incompatible with the new comparative scheme.

First, the provision refers to the payment of the "whole debt" by the solidary obligor. In cases in which plaintiff's recovery has been reduced because of contributory negligence, even the more at fault solidary tortfeasor will no longer be liable for the "whole debt," unless that phrase is construed to mean the balance owed by the tortfeasors. It is thus arguable that article 2104 will be limited solely to cases involving innocent plaintiffs. Second, the article states that the insolvency loss shall be shared "equally" among the solvent codebtors. Such equal sharing, at least in basic principle,

60. *E.g.*, *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915, 920 (La. App. 3d Cir. 1964). *Accord*, *Cunningham v. Hardware Mut. Cas. Co.*, 228 So. 2d 700, 707 (La. App. 1st Cir. 1969).

is at odds with the proportionate division of the debt mandated by the amendment to article 2103.

If these apparent inconsistencies are held not to prevent application of article 2104 in the tort context, we can expect anomalous results. Thus assume that plaintiff suffers damage from his own negligence and that of the three defendants (*A*, *B*, *C*), and that *B* is insolvent. The court or jury determines the percentages of fault as follows: *P*, 25%; *A*, 30%; *B*, 30%; *C*, 15%. In *P*'s suit against *A* and *C*, *P* will be entitled to recover 75% of his damages from *A* alone under the provisions of amended article 2324. *A* in turn has a right to collect contribution from *C* and might rely on article 2104 to argue that *C* should pay more than his 15% share to make up for *B*'s insolvency.

In a very similar case, however, it is doubtful that plaintiff would have the same opportunity to require disproportionate contribution from a solvent tortfeasor. Thus, assume the percentages are changed slightly as follows: *P*, 30%; *A*, 25%; *B*, 25%; *C*, 20%. Under article 2324, neither *A* nor *C* would be held solidarily liable but instead each would be required only to pay for his own proportionate share. It is unlikely that *P* could enlist the aid of article 2104 to support the claim that *A* and *C* should share in the insolvency loss. Only by extending the language of article 2104 so as to include plaintiff as a solidary obligor who has "made the payment" could plaintiff prevail.

It is difficult to harmonize the either/or compromise of article 2324 with the sharing approach of article 2104. To prevent confusion, the legislature should provide a clear rule for treatment of the problem of the insolvent tortfeasor and other uncollectible losses. The most equitable solution would be to create a mechanism for redistributing uncollectible shares on a proportionate basis.⁶¹ However, this approach is admittedly complex and may prolong litigation. If simplicity is desired, article 2324 could be further amended to provide that the party more at fault shall bear any loss resulting from the uncollectible nature of a portion of the debt.

Settlement and Release

Although the effect of settlement and release of a joint tortfeasor is not explicitly dealt with in the new legislation, Louisiana caselaw furnishes adequate general guidelines for the court to follow

61. See UNIFORM COMPARATIVE FAULT ACT § 2(d); Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 364-65 (1980); Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 310-11 (1980).

under a comparative system. Settlement with one of several joint tortfeasors raises two principal issues: the finality of the settlement with respect to the nonsettling tortfeasors and the effect of the settlement on the amount plaintiff can recover from these tortfeasors.⁶²

The Civil Code has been construed to allow the plaintiff to settle with and release one of several tortfeasors while reserving his right of action against the remaining tortfeasors.⁶³ The settlement is regarded as final not only between the plaintiff and the settling tortfeasor; it has also operated to preclude the nonsettling tortfeasor(s) from subsequently claiming contribution from the released person.⁶⁴

As a corollary to this finality rule, the plaintiff is entitled to recover only a diminished judgment from the nonsettling tortfeasors, reduced by the part or share of the settling tortfeasor.⁶⁵ This pro rata approach has the effect of placing on the plaintiff (rather than the nonsettling tortfeasors) the risk of any undervaluation of the settlement. Thus if plaintiff settles for what is later determined to be less than the settling tortfeasor's share, he may not recoup his "loss" from any tortfeasor. Correspondingly, plaintiff is allowed to keep the benefit of any overvaluation resulting from the settling tortfeasor's payment of more than his pro rata share.⁶⁶

Louisiana's pro rata approach may easily be modified to conform to the comparative scheme. Rather than reducing the judgment on a

62. For comprehensive discussions of the options with respect to the problem of the settling tortfeasor, see Fleming, *supra* note 9, at 1494-98; Comment, *supra* note 51, at 1275-82.

63. LA. CIV. CODE art. 2203 provides:

The remission or conventional discharge in favor of one of the codebtors *in solido*, discharges all the others, unless the creditor has expressly reserved his right against the latter.

In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made remission.

The courts have applied article 2203 in the tort context. See, e.g., *Hemphill v. Strain*, 341 So. 2d 1186 (La. App. 1st Cir. 1976), *cert. denied*, 343 So. 2d 1072 (La. 1977); *Clay v. State Farm Mut. Auto Ins. Co.*, 330 So. 2d 380 (La. App. 3d Cir. 1976); *Berger v. Fireman's Fund Ins. Co.*, 305 So. 2d 724 (La. App. 4th Cir. 1974).

64. *Morris v. Kospelich*, 253 La. 413, 218 So. 2d 316 (1969); *Cunningham v. Hardware Mut. Cas. Co.*, 228 So. 2d 700 (La. App. 1st Cir. 1969); *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964).

65. See cases cited at note 64, *supra*.

66. Many states follow a pro tanto (rather than pro rata) rule with respect to settlement. Under this approach good faith settlements generally are regarded as final both as to the plaintiff and nonsettling tortfeasors, but the judgment against the remaining tortfeasors is reduced by the amount actually paid by the settling tortfeasor. See, e.g., CAL. CIV. PROC. CODE § 877 (West 1957); FLA. STAT. ANN. § 768.31(5) (West 1976); NEV. REV. STAT. § 17.245 (1973); N.D. CENT. CODE § 32-38-04 (1957); TENN. CODE ANN. § 23-3105 (1968). The pro tanto approach is plaintiff-oriented in that it places any loss due to undervaluation on the nonsettling tortfeasors.

per capita basis, the plaintiff's recovery against the remaining tortfeasors would be reduced by the proportionate share of the settling tortfeasor.⁶⁷ As amended, article 1811 of the Code of Civil Procedure provides a sufficient method for achieving this result since the fact finder may assign a percentage of fault to every person involved in the accident, presumably including those persons who have been released by the plaintiff.

Once the concept of comparative contribution is accepted, of course, the considerations underlying the settlement process become more complex. As under present law, the parties to settlement negotiations must predict how many persons ultimately will be held liable for plaintiff's injury (*i.e.*, the number of tortfeasors) and the total amount of plaintiff's damages. Additionally, with comparative contribution in force, the negotiators must estimate the degree of fault that will be assigned to each tortfeasor as well as the plaintiff.

Under the new comparative scheme, the likelihood of "miscalculation" surely would increase, making the occurrence of undervaluation and overvaluation more frequent. However, this consideration alone does not necessitate a change in the basic approach. The experience of other jurisdictions indicates that the complexities involved in settlements pursuant to a comparative system have not made the process unworkable.⁶⁸ Most significantly, Louisiana's scheme is particularly compatible with comparative contribution: it accords finality to settlement and places the risk of miscalculation on the persons who participated in the settlement negotiations.

Both the new legislation and the prior caselaw have left unresolved the proper treatment of settlements when one of the remaining tortfeasors is or becomes insolvent. For example, suppose plaintiff (*P*) settles with *A* reserving his rights against *B* and *C*. Subsequently, in *P*'s action against *B* and *C*, it is discovered that *C* is insolvent.

The Louisiana courts have yet to decide how the insolvency loss should be distributed in such a case. There are at least three possible solutions. The court could rule that (1) *P* may recover 2/3 of his damages from *B* and *B* may not seek contribution from *A* due to the

67. Effecting a proportionate rather than per capita deduction is consistent with the language of article 2203, see note 63, *supra*, that simply provides for a deduction of the "part" of the released tortfeasor. After adoption of comparative contribution, "part" may justifiably be construed to mean "proportionate share."

68. For a discussion of the impact of the proportionate rule on settlements in admiralty and maritime personal injury cases, see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407-08 (1975). See also *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1968) (proportionate reduction of settling tortfeasor's share adopted for Virgin Islands).

prior release;⁶⁹ (2) *P* may recover 2/3 of his damages from *B*, but, in a subsequent contribution action *B* may require *A* to share half of the "loss" from *C*'s insolvency;⁷⁰ (3) *P* may recover only 1/2 his damages from *B* since *P* voluntarily chose to settle with *A* and therefore must also risk that one of the remaining tortfeasors will be insolvent.⁷¹

69. Requiring the remaining solvent tortfeasor to shoulder the insolvency loss seems consistent with the legal rationale supporting the pro rata approach. The decision to reduce the judgment by the share of the settling tortfeasor (rather than by the dollar amount of the settlement) is based on the doctrine of legal subrogation. The courts have held that the release given to the settling tortfeasor by the plaintiff has the effect of depriving the unreleased tortfeasor of his right to claim contribution from the released party. Since the plaintiff has voluntarily given up his right to proceed against the released person, the remaining tortfeasor cannot acquire that right via subrogation. *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915, 921 (La. App. 3d Cir. 1964); see *Cunningham v. Hardware Mut. Cas. Co.*, 228 So. 2d 700, 704 (La. App. 1st Cir. 1969).

The release, however, has no legal effect on the solvent tortfeasor's right to seek contribution from an insolvent joint tortfeasor who has not been released by the plaintiff. That the exercise of the contribution right in this instance will not lessen the solvent tortfeasor's burden is solely attributable to the fact of insolvency and cannot be traced to any action on the plaintiff's part.

70. Conceivably, *B* could base his claim of the contribution right against *A* on Civil Code article 2105 which provides:

In case the creditor has renounced his action *in solido* against one of the debtors, and one or more of the other codebtors become insolvent, the portion of the insolvent shall be made up, by equal contribution, by all the debtors, and even those precedently discharged from the debt by the creditor *in solido*, shall contribute their part.

A superficial reading of the article might suggest that it was intended to establish an independent contribution right against released tortfeasors in all cases of insolvency. Although the courts have yet to address the issue, it is most probable that the provision has very limited application. By its own terms, article 2105 governs only the case in which the creditor has renounced his "action *in solido* against one of the debtors." (Emphasis added.) The article apparently is intended to cover only those rare instances in which the creditor consents to a division of the debt with regard to the settling tortfeasor (i.e., renounces his action *in solido* as to that debtor only), but does not simultaneously release the settlor from his obligation to pay his fair share of the debt. See LA. CIV. CODE arts. 2100-01.

The limited release contemplated by article 2105 differs significantly from the ordinary article 2203 release, see note 63, *supra*, by which the creditor unconditionally absolves the settlor from any further payment. If only a limited release is secured, the settling tortfeasor's exposure is twofold: (1) he may be required to share in the insolvency loss under article 2105 and (2) he remains liable to the plaintiff in the event that the consideration paid under the settlement turns out to be less than his virile share.

71. The only arguable statutory basis for requiring plaintiff to share the insolvency loss is Civil Code article 2203, see note 63, *supra*. *B* might contend that *C*'s insolvency should be held to increase the virile share or "part" of each solvent tortfeasor from 1/3 to 1/2, since there is no longer any real opportunity for a three-way division of the debt. *B*'s argument would be most persuasive if it could be demonstrated that the plaintiff knew of *C*'s insolvency at the time of the settlement. In such cases, it is

Under a contributory negligence scheme, the most appropriate solution would be to place the entire insolvency loss on the nonsettling solvent tortfeasor, at least when it was not apparent at the time of settlement that a remaining tortfeasor was insolvent. Thus *P* should be able to secure 2/3 of the damages from *B* and *B* should not be able to mitigate his loss by seeking contribution from the released party. As between *P* and *B*, it is fair to require the party who is at fault to bear the loss; the totally innocent plaintiff should not be required to shoulder 1/2 of the insolvency burden solely because he chose to settle rather than litigate all claims. Moreover, although *A* is also a tortfeasor, he should be permitted to benefit from his settlement with the plaintiff, even at the expense of *B*. Presumably, *B* had the option to settle with the plaintiff rather than take his chances at trial.

The equities differ, however, under a comparative regime when the plaintiff is also negligent. Granted the settlement should be treated as final and the settling tortfeasor should escape paying for the insolvency loss. But it would be unfair to charge the nonsettling solvent tortfeasor with the entire insolvency loss by reducing plaintiff's judgment only by the proportionate share of the settling tortfeasor. Instead, it would be preferable to distribute the shortfall resulting from *C*'s insolvency between *P* and *B* in proportion to their degrees of fault.⁷² Thus *P*'s judgment would be reduced by both the proportionate share of the settling tortfeasor and that part of *C*'s share that *P* should proportionately bear.

The proportionate sharing approach is not totally foreclosed by either the new legislation or the jurisprudence. As discussed earlier, however, amended article 2324 may be read to impose the entire insolvency loss on either the plaintiff or the nonsettling solvent tortfeasor, depending on who was more at fault.⁷³ A clear legislative statement on the problem would be helpful.

Set-off or Compensation

The proper treatment of reconventional demands or counterclaims under a pure comparative negligence system is an issue that arises both in the simple two party case and in multiple party litigation.⁷⁴ With the adoption of pure comparative negligence

perhaps reasonable to view plaintiff's release of *A* as effectively releasing 1/2 of the debt.

72. For an explanation of the mechanics of proportionate reduction in cases involving both insolvency and prior release, see UNIFORM COMPARATIVE FAULT ACT § 6, comment.

73. See text at notes 59-61, *supra*.

74. For discussion of the options regarding the set-off problem, see Fleming, *supra* note 9, at 1470-71; Pearson, *supra* note 61, at 358-59; Wade, *supra* note 61, at 311-12.

there is an increased likelihood that both (or all) parties may be entitled to recover for damages sustained in an accident. For example, in a three car collision resulting in injury to the three drivers due to the combined negligence of each, it would be impossible or at least highly unlikely that all three would recover damages under a contributory negligence or a modified comparative negligence regime.⁷⁵ If pure comparative negligence is in force, however, each driver may be allowed to recover on his claim; it is at this point that the problem of whether the resulting liabilities should be set off frequently will arise.

The set-off determination involves more than procedural niceties or efficient administration—when any party carries liability insurance, the determination may dramatically affect the parties' ultimate recovery. Assume that *A* and *B* each suffers \$100,000 of damage, that both acted negligently, and that their respective degrees of fault are assessed at 30% and 70%. Under the new Act, *A* now owes *B* \$30,000 and *B* correspondingly owes \$70,000 to *A*. If both parties are uninsured, it would be simple and equitable to render one judgment in favor of *A* for \$40,000, thus offsetting their respective liabilities.

However, if the parties are fully insured, requiring or permitting *B*'s insurer to simply pay *A* \$40,000 would be grossly unfair to both injured parties. Neither *A* nor *B* has received full compensation for his injury—in fact both are short by \$30,000. Most importantly, each party obtained insurance so that the carrier, not the insured, would ultimately bear the costs attributable to the insured's negligence. Permitting set-off under these circumstances would allow the insurers to save \$60,000 at the expense of the tort victims. In essence, each insurer could escape paying for \$30,000 worth of injuries caused by its insured's negligence simply by relying on its insured's offsetting claim against the tortfeasor.⁷⁶

Despite its substantive importance, the question of set-off is not dealt with in the comparative negligence Act.⁷⁷ In the absence of such special legislation, reference must be made to the Civil Code

75. In a modified comparative negligence jurisdiction, all three drivers would be entitled to some recovery if they were equally at fault and if the law provides that the plaintiff's fault should be compared to the *combined* fault of the defendants. See Pearson, *supra* note 61, at 358 n.62.

76. For an example of the drastic effect of set-off in a three-party case, see Robertson, *Comparative Negligence*, 24 LA. B.J. 180, 183-84 (1976).

77. Only a few comparative negligence acts contain special provisions on set-off. See, e.g., OR. REV. STAT. § 18.490 (1975) (barring set-off); R.I. GEN. LAWS § 9-20-4.1 (1971) (barring set-off); TEX. REV. CIV. STAT. ANN. art. 2212a § 2(f) (Vernon 1973) (mandatory set-off).

articles dealing generally with compensation to determine to what extent offsetting claims may be used to reduce the insurer's obligation under the new scheme.⁷⁸

Compensation functions as one method of extinguishing an obligation.⁷⁹ Where applicable, the Civil Code provides for compensation by the mere operation of law, even absent the parties' prior agreement.⁸⁰ The most significant prerequisite for legal compensation to take place is that the offsetting debts be "equally liquidated and demandable."⁸¹

In the typical tort action, however, the debt owed by the tortfeasor will not be considered liquidated until it is reduced to judgment;⁸² it is only after judgment has been rendered that legal compensation becomes an issue.⁸³ Thus, in the prior example, there is nothing to prevent the court from rendering two separate judgments, one in favor of *A* for \$70,000 and another in favor of *B* for \$30,000.⁸⁴ At that point, however, legal compensation definitely

78. Since there is considerable risk that the general Code articles on compensation could be misapplied in the comparative setting (for example, see the confusion in *Calvert Fire Insurance Co. v. Lewis*, 231 La. 859, 863 n.1, 93 So.2d 194, 195 n.1 (1957)), the legislature should consider adoption of a specific set-off provision similar to that of section 3 of the Uniform Comparative Fault Act. See Wade, *supra* note 61, at 311-12. The discussion in the text deals solely with present law in the event that no specific set-off provision is enacted.

79. See generally LA. CIV. CODE arts. 2207-16; 2 M. PLANIOL, CIVIL LAW TREATISE pt. 1, nos. 586-87, at 322 (11th ed. La. St. L. Inst. trans. 1959).

80. LA. CIV. CODE art. 2208 states: "Compensation takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums."

81. LA. CIV. CODE art. 2209. This article provides: "Compensation takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. The days of grace are no obstacle to the compensation."

82. See *Calvert Fire Ins. Co. v. Lewis*, 231 La. 859, 863 n.1, 93 So. 2d 194, 195 n.1 (1957) ("compensation or offset, which takes place by operation of law, applies only as to liquidated debts and has no pertinency to tort claims"); cf. *Hartley v. Hartley*, 349 So. 2d 1258, 1261 (La. 1977) (husband's unliquidated claim for reimbursement of community funds could not offset past due alimony debt).

83. Cf., e.g., *Firmin v. Miller*, 355 So. 2d 977, 978 (La. App. 3d Cir. 1977) ("[a]ny final judgment can be used in setoff or compensation by the judgment creditor against a claim by the judgment debtor").

84. If *B* chooses to plead compensation in a reconventional demand, however, the court may judicially offset the parties' obligations and render only one judgment in favor of *A* for \$40,000. This form of compensation or set-off (termed "judicial compensation") serves merely to avoid two payments and may take place despite the fact that when *B* filed his reconventional demand, his claim against *A* was unliquidated. *Tolbird v. Cooper*, 243 La. 306, 143 So. 2d 80 (1962); *Blanchard v. Cole*, 8 La. 153 (1835). Of course, before the court can declare the offset, it must determine the respective legal

comes into play such that *B* may discharge his obligation by paying *A* \$40,000 from his own pocket.⁸⁵

Despite the termination of the tort litigation, the question of the contractual obligations of the insurers of *A* and *B* is unresolved. Looking to the nature of the insurance contract itself,⁸⁶ *B* should now be able to recover \$70,000 from his own insurer based on the judgment of the court that *B* was liable to *A* for that amount. That *B* has chosen to pay part of that liability by setting off the \$30,000 debt owed to him by *A* is irrelevant insofar as the relationship between *B* and his insurer is concerned. This can be readily understood by examining the situation in which *A*'s debt to *B* arises from a totally unrelated obligation, *e.g.*, *A* owes *B* \$30,000 for services rendered pursuant to a prior building contract between the parties. Certainly under such circumstances *B*'s insurer would not be heard to insist that it need only pay \$40,000 to *B* based on its liability insurance contract. A different result is not required solely because *A*'s obligation to *B* arises from the same event that also produces *B*'s obligation.

Similarly, even after *A* receives \$40,000 from *B*, *A* should nevertheless have the right to obtain \$30,000 from his own insurer, representing the amount of *A*'s liability to *B* pursuant to the judgment of the court in the tort litigation. Although the set-off has effectively ended *A*'s duty to pay \$30,000 to *B*, *A*'s insurer should not be relieved of its contractual obligation to pay for the liability resulting from *A*'s negligent conduct.

Thus if the Civil Code articles on compensation are properly applied, the loss from the accident ultimately will be borne by both insurers in proportion to the negligence of their respective insureds—

liabilities of each party. In essence, the single judgment represents the court's determination that *B* was liable to *A* for \$70,000 and chose to discharge part of that obligation by foregoing his right to collect \$30,000 from *A*. *Cf.* *Standard Roofing Co. v. Ragusa Bros.*, 338 So. 2d 119 (La. App. 1st Cir. 1976) (dismissal of plaintiff's smaller claim improper in judicial offset case).

85. Assuming that *B* chooses not to provoke judicial compensation by asking for such relief in a reconventional demand, see note 84, *supra*, he may still rely on legal compensation to limit execution of *A*'s \$70,000 judgment to \$40,000. See *Pattison v. Edmonston*, 4 La. Ann. 157 (1849); *Firmin v. Miller*, 355 So. 2d 977 (La. App. 3d Cir. 1977); *Sliman v. Mahtook*, 17 La. App. 635, 136 So. 749 (1st Cir. 1931). Thus once *B* pays \$40,000 to *A*, *A* no longer has the option to recover the \$30,000 balance from *B* and must look to his own insurer to recoup his loss.

86. One of the primary purposes of the liability insurance contract is to provide protection to the insured "for any legal liability said insured may have as or for a tortfeasor." LA. R.S. 22:655 (Supp. 1962). Once judgment has been rendered, there can be no doubt that such legal liability exists, and the insurer becomes bound to indemnify its insured for any payment (whether effected by compensation or otherwise) made for the purpose of discharging the legal obligation.

B's insurer paying \$70,000 and *A*'s insurer paying \$30,000. As long as the set-off feature is not held to diminish the obligations of the insurers to their own insureds, an equitable result can be reached under the existing codal scheme.

The Civil Code also provides guidance in the more common case in which the insurer is either joined as a party defendant or is sued as the sole defendant under Louisiana's direct action statute.⁸⁷ Under the direct action statute, the insurer is liable "jointly and in solido" with its insured for injuries sustained by the plaintiff.⁸⁸ In turn, the Civil Code expressly states that a debtor in solido may not raise as a basis for diminution of his liability the indebtedness of the plaintiff to his co-obligor, *i.e.*, the "defense" of compensation is considered a personal defense.⁸⁹

Assume that *A* in the hypothetical case chooses to sue *B*'s insurer alone. In that action, the insurer should not be allowed to argue that *A*'s "offsetting" \$30,000 liability to its insured *B* should reduce its debt from \$70,000 to \$40,000. Moreover, if *B* is joined in the action and presses his claim against *A* and *A*'s insurer, the Civil Code prohibits *A*'s insurer from claiming that it has no duty to pay \$30,000 solely because *B* owes its insured the greater sum of \$70,000. In short, the Civil Code does not permit the insurer to plead compensation when sued as a solidary co-obligor. The result of course is functionally the same as in the litigation between the insureds alone—*i.e.*, *B*'s insurer will pay \$70,000 to *A* while *A*'s insurer will pay *B* \$30,000.⁹⁰

87. LA. R.S. 22:655 (Supp. 1962).

88. LA. R.S. 22:655 (Supp. 1962) provides in part:

The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido

89. LA. CIV. CODE art. 2211 provides in part: "Neither can the debtor *in solido* oppose the compensation of what the creditor owes to his codebtor." The word "oppose" is used in the sense of "assert" or "set up." See 3 LOUISIANA LEGAL ARCHIVES, COMPIL-ED EDITION OF THE CIVIL CODES OF LOUISIANA 1208-09 (La. St. L. Inst. 1942).

90. A problem might arise if only one of the parties is fully insured and the other is either uninsured or has insufficient coverage. Assume, for example, that in the hypothetical case *A* is uninsured and judgment proof. In *A*'s suit against *B*'s insurer, the insurer would presumably have an obligation to pay \$70,000 to *A*, *i.e.*, *B*'s debt to *A* disregarding set-off. In order to secure payment of *B*'s \$30,000 debt to *A*, however, *B* would have to attach or garnish his own insurer's payment to *A*. It is not unlikely that this complicated process would invite confusion such that *B* would be unjustly required to pay for *A*'s failure to adequately insure himself against loss. A more efficient solution would be to require *B*'s insurer to pay \$40,000 to *A* and \$30,000 directly to *B*. In this respect, the present codal scheme might be regarded as inadequate. Neither Louisiana's compulsory insurance law, LA. R.S. 32:861-64 (Supp. 1977), nor the

The determination that the insurer should not benefit from compensation or set-off is fortified by the express policy of Louisiana's direct action statute.⁹¹ That provision has recently been viewed as serving a dual purpose: to assure financial protection of victims of automobile accidents and to protect the insured against exposure.⁹² Only by denying the insurer the opportunity to benefit from the off-setting claim of its insured will both the injured party and the insured be given the maximum protection.

Conclusion

This selective sampling of the problems posed by Act 431 in multiple party litigation suggests only that successful implementation of comparative fault in Louisiana will not be easy. A reform of this magnitude necessarily entails a host of adjustments. Several subsidiary issues such as the treatment of insolvency losses call for more detailed legislation to conform to the proportionate scheme. For these relatively minor matters, the experience of other jurisdictions can be most helpful in devising clear, equitable statutory rules.

But the introduction of comparative fault in Louisiana also places weighty demands upon the courts. Particularly in the multiple party suit, it is extremely difficult to apportion losses with due regard for the legal duties of the parties as delimited by the court, yet give real effect to the legislative principle of liability based on proportionate fault. Such an accommodation will not likely yield uniform results but nevertheless has the potential to promote the ultimate goal of equitable loss apportionment.

availability of uninsured motorist coverage guarantees that the fully insured victim will be completely protected when injured by an uninsured or underinsured tortfeasor. Section 3 of the Uniform Comparative Fault Act provides an equitable solution in such cases. See Wade, *supra* note 61, at 311-12.

91. LA. R.S. 22:655 (Supp. 1962). The statute provides that

[i]t is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insureds or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.

92. *Holtzclaw v. Falco, Inc.*, 355 So. 2d 1279 (La. 1978) (on rehearing).

